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United States
Court of Appeals
for the Ninth Circuit

MAURICE PENN,

Appellant,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of L. R. MAHAN, Also Known as LEMUEL ROSS MAHAN,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

FILED
OCT [illegible] 1956
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-24-56

No. 15176

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant-Claimant:

JOSEPH W. FAIRFIELD,
6399 Wilshire Blvd.,
Los Angeles 48, Calif.

For Appellee-Trustee:

Frank M. Chichester,
711 Citizens Natl. Bank Bldg.,
453 South Spring St.,
Los Angeles 13, Calif.

DEBTOR'S PETITION

Form No. 1

In the District Court of the United States for the Southern District of California, Central Division

No. 58442—BH

In the Matter of

L. R. MAHAN, Also Known as LEMUEL ROSS MAHAN,

Bankrupt.

To the Honorable Judge of the District Court of the United States for the Southern District of California:

The Petition of L. R. Mahan, also known as Lemuel Ross Mahan, Residing at No. 940 South Hillview Street, in the County of Los Angeles, State of California; by occupation a Salesman, and employed by Johnnie Duca Auto Sales (or engaged in the business of .....), respectfully represents:

1. Your petitioner has had his principal place of business (or has resided, or has had his domicile) at 940 South Hillview, Los Angeles 22, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

/s/ WM. A. MUNNELL,
Attorney for Petitioner.

/s/ L. R. MAHAN,
Petitioner.

State of California,
County of Los Angeles—ss.

I, L. R. Mahan also known as Lemuel Ross Mahan, the petitioner named in the foregoing petition,

do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ L. R. MAHAN,
Petitioner.

Subscribed and sworn to before me this 16th day of October, 1953.

[Seal] /s/ GEORGE E. MARUYA,
Notary Public in and for
Said County and State.

My Commission Expires July 27, 1956. [2*]

Summary of Debts and Assets

(From the Statements of the Debtor in Schedules A and B)

Schedule A 1—a—Wages	$ 325.00
Schedule A 1—b (1)—Taxes due United States	259.32
Schedule A 1—b (2)—Taxes due States	2,288.52
Schedule A 1—b (3)—Taxes due counties, districts and municipalities	
Schedule A 1 c (1)—Debts due any person, including the United States, having priority by laws of the United States included above	
Schedule A 1—c (2)—Rent having priority	150.00

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Schedule A 2—Secured claims	$32,227.64
Schedule A 3—Unsecured claims	14,638.61
Schedule A 4—Notes and bills which ought to be paid by other parties thereto unknown	.....
Schedule A 5—Accommodation paper	.....
Schedule A, total	**$49,889.09**
Schedule B 1—Real Estate	$ 4,772.36
Schedule B 2—a—Cash on hand	.....
Schedule B 2—b—Negotiable and non-negotiable instruments and securities	.....
Schedule B 2—c—Stocks in trade	.....
Schedule B 2—d—Household goods	650.00
Schedule B 2—e—Books, prints and pictures	.....
Schedule B 2—f—Horses, cows, and other animals	.....
Schedule B 2—g—Automobiles and other vehicles	.....
Schedule B 2—h—Farming stock and implements	.....
Schedule B 2—i—Shipping and shares in vessels	.....
Schedule B 2—j—Machinery, fixtures and tools	.....
Schedule B 2—k—Patents, copyrights, trade-marks	.....
Schedule B 2—l—Other personal property	.....
Schedule B 3—a—Debts due on open accounts	.....

Schedule B 3—b—Policies of insurance	.....
Schedule B 3—c—Unliquidated claims	$1,719.61
Schedule B 3—d—Deposits of money in banks and elsewhere	5,577.50
Schedule B 4—Property in reversion, remainder, expectancy or trust	.....
Schedule B 5—Property claimed as exempt (included above) $500.00	.....
Schedule B 6—Books, deeds and papers	.....
Schedule B, total	$92,719.47

/s/ L. R. MAHAN,
Petitioner.

[Endorsed]: Filed October 16, 1953. Refe. [3]

United States District Court for the
Southern District of California

ORDERS OF ADJUDICATION AND OF GENERAL REFERENCE

At Los Angeles, in said District, on October 16, 1953.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number: 58442-BH.

Title of Proceedings: L. R. Mahan, also known as Lemuel Ross Mahan.

Filed: 10-16-53.

Referee: David B. Head, Esq., Los Angeles, Calif.

ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed Oct. 16, 1953. U.S.D.C. [22]

[Title of District Court and Cause.]

BOND OF TRUSTEE

Know All Men by These Presents: That we, William R. Grant of Arcadia, as principal, and A. S. Menick, of Los Angeles, and A. G. Imig, of Los Angeles, as sureties, are held and firmly bound unto the United States of America in the sum of one hundred dollars, in lawful money of the United States,

to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this 3rd day of November, 1953.

The condition of this obligation is such that whereas the above-named William R. Grant was, on the 2nd day of November, 1953, appointed trustee, in the case pending in bankruptcy in said court, wherein L. R. Mahan, also known as Lemuel Ross Mahan, is the bankrupt, and he, the said William R. Grant, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, of the said William R. Grant, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in the presence of:

/s/ WILLIAM R. GRANT,

/s/ A. S. MENICK,

/s/ A. G. IMIG.

[Endorsed]: Filed November 9, 1953, Referee.

[Endorsed]: Filed November 12, 1953. [23] U.S.D.C.

[Title of District Court and Cause.]

DISCHARGE OF BANKRUPT

At Los Angeles, in said District, on the 16 day of December, 1953. It appearing that L. R. Mahan, also known as Lemuel Ross Mahan, of Los Angeles, in the County of Los Angeles, State of California, was duly adjudged a bankrupt on a petition filed by him on the 16 day of October, 1953; and

It further appearing that, after due notice by mail, no objection to the discharge of said bankrupt was filed within the time fixed by the court;

It is ordered that the said L. R. Mahan, also known as Lemuel Ross Mahan, be, and he hereby is, discharged from all debts and claims which, by the Act of Congress relating to Bankruptcy, are made provable against his estate, except such debts as are, by said Act, excepted from the operation of a discharge in bankruptcy.

DAVID B. HEAD,
Referee in Bankruptcy.

United States of America,
Southern District of California,
Central Division—ss.

I, David B. Head, Referee in Bankruptcy in and for the County of Los Angeles, State of California, in for the said court do hereby certify that the

within instrument is a true and correct copy of the original as the same appears of record in my office.

In witness whereof, I hereunto set my hand this 16 day of December, 1953.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed December 18, 1953. [24]

Referee.

[Title of District Court and Cause.]

NOTICE OF HEARING OF REVIEW

To: Frank Chichester, Trustee in Bankruptcy:

Please take notice that the undersigned will bring a Certificate of Review, filed with the Clerk of the above-entitled Court on the 16th day of April, 1956, on for hearing before the Hon. Ben Harrison, United States District Judge, in his courtroom located at the United States Court House, 312 North Spring Street, County of Los Angeles, State of California, on the 30th day of April, 1956, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: April 18th, 1956.

/s/ JOSEPH W. FAIRFIELD,
Attorney for Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed April 20, 1956, U.S.D.C. [25]

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW

To: Hon. Ben Harrison, United States District Judge:

The undersigned, Joseph J. Rifkind, a Referee in Bankruptcy of the above-entitled court, does hereby certify as follows:

Statement of Case

The above-named bankrupts filed their voluntary petitions in bankruptcy together with schedules of their assets and liabilities on October 16, 1953.

Petitioner on Review within four months of the filing of bankruptcy filed an action entitled Maurice Penn v. L. R. Mahan, et al., Municipal Court of the City of Los Angeles, No. 124775 and caused an attachment therein to be levied upon the real property of the bankrupts on September 16, 1953. Judgment was entered in said action in favor of petitioner and against the bankrupts on October 30, 1953, for the sum of $2,237.80.

An order to show cause was issued upon the petition of the trustee in bankruptcy requiring the Petitioner on Review to show cause why the said attachment lien should not be vacated and set aside as being void under Section 67(a) of the Bankruptcy Act. The only material allegation of the petition, which is controverted by the [30] answer, is the allegation that the bankrupts were insolvent on the date when said attachment was levied.

Question Presented on Review

The only question presented and to be determined on review is whether the bankrupts were insolvent on the date when the attachment was levied.

Summary of Evidence

The bankrupts, prior to bankruptcy on September 13, 1953, filed an action against Seaboard Finance Company for $81,719.61, being treble the amount of usurious interest alleged to have been paid. The action in due course came on for trial and was permitted to go off calendar and had not been reset for trial at the time of the hearing herein.

The bankrupts' schedules show assets of $92,719,47, consisting of the following items:

1.	The above claim for usury	$81,719.61
2.	Household furniture (exempt)	500.00
3.	Wearing apparel (exempt)	150.00
4.	Alleged equity in real estate	4,772.36
5.	Checking account balance	28.50
6.	Withholds on contracts by Seaboard Finance Co.	2,207.11
7.	Dealers reserves held by Seaboard Finance Co.	3,341.89
	Total	$92,719.47

The banrupts schedule liabilities of $49,889.09. The testimony at the hearing was reported and if the transcript thereof is necessary the same may be

procured by Petitioner on Review and furnished to the court. [31]

Findings of Fact, Conclusions of Law and Order

The question of the solvency or insolvency of the bankrupt at the time of the levy of the attachment depends upon the "fair valuation" of the claim for usury. The Referee in Bankruptcy concluded from the evidence and the authorities cited that the claim for usury was too inchoate and uncertain in character and amount to place any appreciable value thereon in determining the solvency or insolvency of the bankrupt at the time the attachment was levied. The Referee in Bankruptcy therefore concluded that the bankrupts were insolvent when the attachment was levied on September 16, 1953, and that the lien of said attachment was void and of no force or effect against the trustee in bankruptcy under Section 67(a) of the Bankruptcy Act.

The Findings of Fact and Conclusions of Law are incorporated in and are part of the Order of February 20, 1956, from which the review is taken.

Documents Transmitted With Certificate

1. Petition re Attachment Lien filed December 7, 1955.

2. Order to Show Cause re Attachment Lien issued December 8, 1955.

3. Answer to Petition re Attachment Lien filed December 23, 1955.

4. Trustee's Memorandum of Authorities filed January 6, 1956.

5. Respondent's Memorandum of Authorities filed January 12, 1956.

6. Memorandum Opinion of Referee filed January 31, 1956.

7. Findings of Fact, Conclusions of Law and Order filed February 20, 1956. [32]

8. Petition for Review.

9. Notice of Filing Certificate of Review.

Dated: April 16, 1956.

Respectfully transmitted,

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

cc: Frank M. Chichester, Esq., 453 South Spring Street, Los Angeles, California, Attorney for Trustee; Joseph W. Fairfield, Esq., 6399 Wilshire Blvd., Los Angeles 48, California, Attorney for Petitioner on Review. [33]

[Title of District Court and Cause.]

NOTICE OF FILING CERTIFICATE ON REVIEW

To: Frank M. Chichester, Esq., Attorney for Trustee; Joseph W. Fairfield, Esq., Attorney for Petitioner on Review:

Notice is hereby given that the undersigned Referee in Bankruptcy filed with the clerk of the above-

entitled court on April 16, 1956, his Certificate on Review of the Order dated February 20, 1956.

You are further notified that subdivision d of Rule 204 of the United States District Court for the Southern District of California requires the Petitioner on Review, within 5 days after the mailing of notice of the filing of the referee's certificate to serve upon the respondent and file with the clerk a memorandum of his points and authorities, and the respondent to serve and file his reply memorandum within three days thereafter.

Dated: April 16, 1956.

JOSEPH J. RIFKIND,
Referee in Bankruptcy.

cc: Frank M. Chichester, Esq., 453 South Spring Street, Los Angeles, California; Joseph W. Fairfield, Esq., 6399 Wilshire Blvd., Los Angeles 48, California. [52]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE RE ATTACHMENT LIEN

To: The Honorable Joseph J. Rifkin, Referee in Bankruptcy:

Your petitioner, William R. Grant, duly appointed, qualified and acting trustee in bankruptcy herein, respectfully represents:

1. That orders of adjudication in bankruptcy were entered in the above-named matters on or about October 16, 1953. That prior to the commencement of said bankruptcy proceedings and on or about September 16, 1953, the respondent, Maurice Penn, caused an attachment to be levied in Municipal Court Case No. 124775 entitled Maurice Penn vs. L. R. Mahan, on certain real property described as Lot 28 in Tract No. 8790, as per map recorded in Book 117, Pages 43 and 44 of Maps, records of Los Angeles County, State of California.

2. That thereafter and on or about October 30, 1953, said respondent caused a judgment to be entered in said Municipal Court action in the sum of $2,237.80. [34]

3. That at the time of the levy of attachment the above-named bankrupts were actually insolvent. That by virtue of the provisions of Section 67 (a) of the Bankruptcy Act said levy of attachment and the subsequent judgment lien were and are void and of no effect as against your petitioner and the above-named bankrupt estates.

Wherefore, your petitioner prays for an order requiring the respondent, Maurice Penn, to show cause, if any he has, why an order should not be made and entered herein decreeing the above-mentioned attachment and judgment lien to be null and void as against your petitioner and the above-named estate, and for such other order as to the Court may seem just.

Dated this 6th day of December, 1955.

/s/ WILLIAM R. GRANT,
Trustee in Bankruptcy.

/s/ FRANK M. CHICHESTER,
Attorney for Trustee.

Duly verified.

[Endorsed]: Filed December 7, 1955. [35]

Referee.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE RE ATTACHMENT LIEN

Upon reading and filing the verified petition of William R. Grant, trustee in bankruptcy herein, and good cause of appearing therefrom and no adverse interest appearing thereto,

It is ordered that the respondent named therein, Maurice Penn, be and appear before the undersigned at his courtroom, 330 Federal Building, Temple and Spring Streets, Los Angeles, California, on Wednesday, the 21st day of December, 1955, at the hour of 10:00 a. m., then and there to show cause, if any he has, why an order should not be made and entered herein in accordance with the prayer for the said petition.

It is further ordered that a copy of said petition and of this order to show cause be served upon said

respondent by United States Mail not less than five days prior to the hearing thereon.

It is further ordered that the respondent, Maurice Penn, file a written response to the petition for order to show cause not later than two days prior to the hearing thereon and that said [36] respondent serve a copy thereof upon the attorney for the trustee; that failure to file and serve such a response shall be deemed a consent to the entry of an order as prayed for in said petition for order to show cause.

Dated this 8 day of December, 1955.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed December 8, 1955. [37] Referee.

[Title of District Court and Cause.]

ANSWER TO PETITION FOR ORDER TO SHOW CAUSE RE ATTACHMENT LIEN

Comes now the respondent, Maurice Penn, and answering the petition for an Order to Show Cause re Attachment Lien, alleges as follows:

I.

Generally and specifically denies each and every allegation contained in Paragraph III of said petition dated the 6th day of December, 1955.

Wherefore, your petitioner respectfully prays that the petition be denied.

Dated: December 16th, 1955.

/s/ MAURICE PENN,
Respondent.

/s/ JOSEPH W. FAIRFIELD,
Attorney for Respondent.

[Endorsed]: Filed December 23, 1955. [38]

Referee.

[Title of District Court and Cause.]

MEMORANDUM OPINION AS TO VALIDITY OF ATTACHMENT LIEN OF MAURICE PENN

The trusee in bankruptcy seeks to set aside the attachment lien of respondent obtained within four (4) months of bankruptcy under section 67c of the Bankruptcy Act. The bankrupts on September 13, 1953, filed an action against the Seaboard Finance Company for $81,719.61, being treble the amount of usurious interest alleged to have been paid. The action was permitted to go off calendar when it came up for trial and has not been reset for trial to date.

The bankrupts schedule claims of $49,889.09 and assets of $92,719.47 (which includes (1) the claims

for usury of $81,719.61. (2) household furniture of $500.00 and wearing apparel of $150.00 claims as exempt, and (3) money earned within thirty days of the filing of the petition in bankruptcy in the amount of $300.00 claimed as exempt). The remaining assets scheduled consist of real estate in which the bankrupts allege an equity of $4,772.36, [44] a checking account of $28.50, withholds on contracts by Seaboard Finance Company of $2,207.11 and dealers reserve sales held by Seaboard Finance Company of $3,341.89.

It is apparent, that except for the claim for usury, the bankrupts were at the date of the attachment insolvent. The solvency or insolvency of the bankrupts therefor depends upon the "fair valuation" of the claim for usury (see subdivision 19 of section 1 of the Bankruptcy Act).

Mrs. Mahan, one of the bankrupts, a lay woman, testified that she and her husband believed they had a good cause of action for usury against the Seaboard Finance Company. The able counsel for the bankrupts who filed the action and the attorney for the trustee in bankruptcy, both frankly admit that a very serious legal question exists as to whether the Seaboard Finance Company is subject to the provisions of the Usury Act or is a personal loan company excluded from the provisions thereof. There is also a question of fact as to the amount of the recovery if the action is maintainable.

It seems to me that the claim is too inchoate and uncertain in character and amount to place any ap-

preciable value thereon in determining the solvency of the bankrupt at the time the attachment was levied. See Collier on Bankruptcy, Vol. 1, pages 77 and 78, First National Bank v. Wyoming Ice Company (D. C. Pa.) 136, Fed. 466, Houghton Wool Company v. Morris (C.C.A. 1) 249 Fed. 434 and In re Cooper (D. C. Mass.) 12 Fed. (2) 7.

It is therefore the opinion of the court that the bankrupts were insolvent on the date of the levy of the attachment and that the attachment lien of the respondent is null and void as to the trustee in bankruptcy under section 67c of the Bankruptcy Act. Counsel for the trustee in bankruptcy [45] will within five (5) days prepare, serve and submit an appropriate order as required by rule 7 of the District Court.

Dated: January 31, 1956.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

cc: Frank M. Chichester, Esq., Attorney for trustee; Joseph W. Fairfield, Esq., Attorney for respondent.

[Endorsed]: Filed January 31, 1956. [46]
Referee.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

It appearing that a petition for an order to show cause relative to a levy of attachment having been filed herein by the trustee in bankruptcy and an order to show cause having regularly been issued thereon and said order to show cause having regularly come on for hearing before the undersigned on December 28, 1955, at the hour of 2:00 p.m., and the trustee having appeared by his attorney, Frank M. Chichester, and the respondent, Maurice Penn, having appeared by his attorney, Joseph W. Fairfield, and evidence having been introduced and the Court being fully advised in the premises, now makes the following:

Findings of Fact

1. That orders of adjudication in bankruptcy were entered in the above-named matters on or about October 16, 1953.

2. That prior to the commencement of said bankruptcy proceedings and on or about September 16, 1953, the respondent, Maurice Penn, caused an attachment to be levied in Municipal Court [47] Case No. 124,775, entitled Maurice Penn vs. L. R. Mahan, on certain real property described as Lot 28 in Tract No. 8790, as per map recorded in Book 117, Pages 43 and 44 of Maps, records of Los Angeles County, State of California.

3. That thereafter and on or about October 30, 1953, said respondent caused a judgment to be entered in said Municipal Court action in the sum of $2,237.80.

4. That at the time of the levy of said attachment, to wit, September 16, 1953, the above-named bankrupts were actually insolvent, in that the aggregate of their property, exclusive of any property which they may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay their creditors, was not at a fair valuation sufficient in amount to pay their debts.

5. That the alleged claim set forth in the schedules of the bankruptcy for usury in the sum of $81,719.61 is inchoate and uncertain in character and amount and has no appreciable value.

From the foregoing findings of fact the Court makes the following:

Conclusions of Law

1. That the said levy of attachment was made within four months of the date of adjudication in bankruptcy.

2. That at the time of the levy of attachment the above-named bankrupts were actually insolvent under the definition of insolvency as it appears in Section 1 (19) of the Bankruptcy Act, and by virtue of the provisions of Section 67 (a) of the Bankruptcy Act, said levy of attachment and the subsequent judgment lien were and are void and of

no effect as against the trustee in bankruptcy and the above-named bankrupt estates. [48]

Order

Now, therefore, it is ordered that the levy of attachment issued out of the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, in Case No. 124 775, entitled Maurice Penn vs. L. R. Mahan, on certain real property described as Lot 28 in Tract No. 8790, as per map recorded in Book 117, Pages 43 and 44 of Maps, records of Los Angeles County, State of California, be, and the same is hereby adjudged to be void and of no effect as against the trustee in bankruptcy in the above-named matters or as against the above-named bankrupt estates.

Dated at Los Angeles, California, this 20 day of February, 1956.

/s/ JOSEPH RIFKIND,
Referee in Bankruptcy.

/s/ FRANK M. CHICHESTER,
Attorney for Trustee.

Disapproved as to form as required by Rule 7. Objections filed.

Dated February 3rd, 1956.

/s/ JOSEPH W. FAIRFIELD,
Attorney for Maurice Penn.

[Endorsed]: Filed February 20, 1956. [49]
Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Joseph Rifkind, Referee in Bankruptcy:

The petition of Maurice Penn, respectfully represents:

1. That the petitioner is a creditor of the above-named bankrupt.

2. That on the 20th day of February, 1956, an order was made by the Referee herein and filed in this Court as follows:

"Now, therefore, it is ordered that the levy of attachment issued out of the Municipal Court of the City of Los Angeles, State of California, in Case No. 124,775, entitled Maurice Penn vs. L. R. Mahan, on certain real property described as Lot 28 in Tract No. 8790, as per map recorded in Book 117, Pages 43 and 44 of Maps, records of Los Angeles County, State of California, be, and the same is hereby adjudged to be void and of no effect as against the trustee in bankruptcy in the above-named matters or as against the above-named bankrupt estates."

3. Your petitioner, being aggrieved by the said order, prays for review thereof and complains that the Court committed error in making the said order in that the Court failed to find that the Trustee in Bankruptcy failed to sustain the burden of proof that the bankrupt was insolvent on or about the

16th day of [50] September, 1953, at which time the respondent, Maurice Penn, caused an attachment to be levied on the real property of the bankrupt described in said order.

Wherefore, petitioner prays that said order be reviewed by a Judge of this Court and that the referee prepare and submit to the Clerk thereof a certificate thereon, together with a statement of the qustions presented and a transcript of the evidence taken at the hearing, together with all the exhibits therein offered.

/s/ JOSEPH W. FAIRFIELD,
Attorney for Petitioner.

[Endorsed]: Filed March 12, 1956, Referee.

[Endorsed]: Filed April 20, 1956, U.S.D.C. [51]

In the United States District Court, Southern District of California, Central Division

In Bankruptcy No. 58442-BH, 58443-BH

Before: Honorable Joseph J. Rifkind, Referee in Bankruptcy.

In the Matter of

L. R. MAHAN, GRACE MAHAN,

Bankrupts.

HEARING ON CONTINUED ORDER TO SHOW CAUSE RE ATTACHMENT LIEN

The following is a stenographic transcript of the proceedings in the above-entitled cause, which came

on for hearing before the Honorable Joseph J. Rifkind, United States Referee in Bankruptcy, at his courtroom, 330 Federal Building, Los Angeles, California, at the hour of 2:00 p.m., Wednesday, December 28, 1956.

Appearances:

For the Trustee:
FRANK M. CHICHESTER.

For Creditor Penn:
JOSEPH FAIRFIELD.

For the Bankrupt:
WILLIAM A. MUNNELL. [58]

December 28, 1955—2:00 P.M.

The Referee: Are you ready to proceed in the matter of L. R. Mahan and Grace Mahan, continued order to show cause re attachment lien?

Mr. Chichester: Ready for the Trustee.

Mr. Fairfield: Ready for Mr. Penn.

The Referee: In this matter we have two items: One is a petition to compromise. The other is an order to show cause in re the attachment lien.

Mr. Chichester: May it please the Court, the order to show cause should be heard first, as the petition to compromise is predicated on the result that may be achieved under the order to show cause.

The Referee: Very well. We will proceed with the order to show cause re the attachment.

Mr. Chichester: As an opening statement, your Honor, the petition——

The Referee: I have read the petition.

Mr. Chichester: The Answer filed denies only the allegations contained in paragraph three, so the rest of the allegations in the petition are admitted.

Now in accordance with our telephone conversation a few weeks ago I would like to call Mrs. L. R. Mahan; Mrs. Grace Mahan. [59]

GRACE MAHAN

called as a witness, being first duly sworn, was examined and testified as follows:

The Referee: Please be seated and state your full name.

The Witness: Grace Mahan.

Direct Examination

By Mr. Chichester:

Q. You are one of the bankrupts in this proceeding? A. Right.

Q. And you are the wife of L. R. Mahan, the other bankrupt in these consolidated proceedings?

A. Yes, that is correct.

Q. Were you active in the business of Mr. Mahan prior to adjudication in bankruptcy?

A. I was.

Q. For about how long a period of time had you been so active? A. About eight years.

(Testimony of Grace Mahan.)

Q. What was the general nature of the business of Mr. Mahan?

A. Used car business.

Q. Where was his principal place of business located? A. 966 South Atlantic.

Q. The premises at the location that are involved in [60] this order to show cause is described as Lot 28 in Tract 8790. Is the address the same as that legal description?

A. That is right.

Q. Did you attend at his place of business daily?

A. Most every day; yes.

Q. Directing your attention to September 16, 1953, were you at the place of business during that period of time? A. Yes, sir.

Q. Had you been attending regularly daily for three to six months prior to that period of time?

A. Yes.

Q. In connection with your bankruptcy petition and that of your husband you prepared and filed schedules of your assets and liabilities in those proceedings, did you? A. That is right.

Mr. Chichester: Counsel, I understand, either has or has seen the schedules filed by the bankrupts. Is that correct?

Mr. Fairfield: Yes. You are talking now about the bankruptcy of Mrs. Mahan—she is not a party in this action.

Mr. Chichester: She is being called as a witness. I am directing my questions to the bankruptcy of Mr. Mahan, in which this proceeding is pending.

(Testimony of Grace Mahan.)

Q. I will show you what purports to be a copy of [61] the petition in bankruptcy of L. R. Mahan, case number 58442, and ask you if it bears his signature? A. It does.

Q. Referring now to the schedules attached to that petition on page 2, does that bear the signature of Mr. Mahan? A. Yes.

Q. On page 3 is that the signature of Mr. Mahan? A. Yes.

Mr. Fairfield: There is no dispute as to any of that, Mr. Chichester.

Mr. Chichester: Do you stipulate that the schedules of Mr. Mahan were duly signed by him?

Mr. Fairfield: No question about that.

Q. (By Mr. Chichester): Directing your attention to September 16, 1953, do you know whether or not Mr. Mahan was indebted to Mildred Runyon?

A. Yes, he was.

Q. In what amount? A. $325.

Q. That was for what?

A. One month's salary.

Q. Did he owe taxes to the United States on that date? A. Yes, he did.

Q. What was the amount? [62]

A. $288.52.

Q. That was to the State of California, was it not? A. Yes.

Q. To the United States Government how much?

A. $259.32.

Mr. Fairfield: If you are trying to get in the fact that those liabilities set forth in the schedules

(Testimony of Grace Mahan.)

were liabilities that were in existence in September. I will go along with you.

Mr. Chichester: September 16, 1953?

Mr. Fairfield: Yes. If you tell me that from your investigation there is no dispute as to that, we won't have to take the time of the Court on this.

Mr. Chichester: Then do I understand you will stipulate that the schedules of liabilities, the liabilities set forth in the schedules, were owing by the bankrupt L. R. Mahan on September 16, 1953?

Mr. Fairfield: Let's make it liabilities and assets that those schedules set forth.

Mr. Chichester: I am asking you if you are stipulating to that. If not, let me go right ahead with my proof.

Mr. Fairfield: I think you better go ahead with your proof, then.

Q. (By Mr. Chichester): Did he at that time owe a Mrs. Emily G. Lepper $150?

A. Yes. [63]

Q. That was under a rental, under a lease that was then due on September 16, 1953?

A. That is right.

Q. On page 4 of the schedules, which is known as Schedule A-3, "Creditors Claims for Unsecured," did Mr. Mahan owe all of the debts that are set forth on that page on September 16, 1953?

A. Yes, he did.

Q. With respect to the debts as set forth on page 4-a did Mr. Mahan owe all of those debts on September 16, 1953? A. Yes, he did.

(Testimony of Grace Mahan.)

Q. On page 5, known as Schedule A-4, it is recited "A contingent liability of an unknown number of contracts entered into by L. R. Mahan and Grace Mahan in and to contracts transferred to Seaboard Finance Company as securities for advances made by Seaboard Finance Company petitioner may have a contingent liability on each of the contracts so transferred. Petitioner alleges that the Seaboard Finance Company is in possession of sums held as reserve for default on said contracts, that potential liability is unascertainable at this time, that the total number of contracts unpaid at this date is unknown to petitioner, but petitioner alleges that said information is known to Seaboard Finance Company," and that amount is shown as [64] "unknown." A. That is correct.

Q. That was unknown at that time, but there was some contingent liability? A. Yes.

Q. Now directing your attention to Schedule B-1, assets of L. R. Mahan under the title "Real Estate," at that time he was buying Lot 28 in Tract 8790 from the Edison Securities Company. Isn't that true? A. Yes.

Q. Deed had not been executed to Mr. Mahan and yourself on September 16, 1953, had it?

A. That is correct. They held the deed.

Q. And you had a contract to purchase. Isn't that true? A. Yes.

Q. Under the terms of the contract to purchase as of that date you owed approximately $13,568.81 to the Edison Securities Company?

(Testimony of Grace Mahan.)

A. That is the correct figure.

Q. Under the contract? A. Yes.

Q. You also owed to Seaboard Finance Company under the terms of a second trust deed covering that same property the balance of $6,658.83?

A. That was the correct figure.

Q. So that the property was valued by you at about [65] what amount on that date?

A. It was appraised at about $25,000.00.

Q. (By the Referee): Appraised by whom?

A. A real estate man.

Q. Did you and your husband consider $25,000 to be the fair market value of the property?

A. We did not. We paid more than that.

Q. I am referring to the present market value at the time the appraisal was made.

A. We thought it was a very low appraisal.

The Referee: You may proceed, counsel.

Q. (By Mr. Chichester): Were you then attempting to sell the property?

A. We were trying to sell to cover our debts.

Q. Do you recall whether you received any bid or offers for the property about that time?

A. We had some offers of about $25,000.

Q. That was about your best offer?

A. That was about the best offer we had at that time. Of course, we had a short time to work.

Q. There was another piece of property in which you had an interest. Did you own the property located at 1005 South Atlantic Boulevard?

A. Yes.

(Testimony of Grace Mahan.)

Q. About what was the value of the property at that time in your opinion? [66]

A. We were once offered $13,000, but we had an appraisal of about seven.

Q. About seven at that time? A. Yes.

Q. Were you then trying to sell that property?

A. Yes.

Q. Do you recall any offers you had at that time or about that time for that piece of property?

A. About $5,000.

Q. And you were then indebted under the terms of a first trust deed to L. Westermoe, the first trust deed covering that property, the balance of that being $12,000. Is that correct?

A. Yes, that is correct.

Q. So then you had no equity in the property?

A. No.

Q. You also had a leasehold interest on the property at 1004 South Atlantic Boulevard in which Mrs. Emily G. Lepper was the lessor?

A. Right.

Q. You didn't own that property? A. No.

Q. What rental were you paying on that?

A. $50 a month.

Q. And you had a leasehold interest on a business lot known as 966 South Atlantic [67] Boulevard? A. Yes.

Q. What was your rental on that?

A. $350.

Q. That is where your place of business was?

A. Yes, that was the main lot.

(Testimony of Grace Mahan.)

Q. You also owned household goods and furniture valued at about $500 on that date?

A. Yes.

Q. And wearing apparel and personal ornaments in the value of $150? A. Right.

Q. You contend that you had a claim or cause of action against Seaboard Finance Company based upon usury. Had you filed an action against Seaboard Finance Company on September 16, 1953, if you recall? A. Yes.

Q. In that action you were claiming damages in the total amount of $81,719.61?

A. That is correct.

The Referee: That is treble damages.

Q. (By Mr. Chichester): But the claim under the prayer is $27,239.87? A. Yes.

Q. That action has subsequently been filed, has it not, by your attorney who is acting for you in this matter, Mr. Munnell? A. Yes. [68]

Q. To your knowledge has that action ever been tried? A. It has not.

Q. You had a commercial bank account at the Bank of America on this date referred to in the sum of $28.50. Was that the amount that was on deposit? A. That is correct.

Q. You allege you had withholds on contracts that had been assigned to the Seaboard Finance Company in the sum of $2,207.11? A. Yes.

Q. And you had a dealer's reserve with that company in the sum of $3,341.89?

A. Yes, that is right.

(Testimony of Grace Mahan.)

Q. Did you have any other assets on September 16, 1953, to the best of your recollection?

A. No.

Mr. Chichester: That's all. You may cross-examine.

Cross-Examination

By Mr. Fairfield:

Q. Were you working with your husband over at that used car lot? A. Yes.

Q. That was a used car lot, was it not?

A. Yes.

Q. May I ask you just what you were doing there? Were you the bookkeeper? [69]

A. No, we had a bookkeeper, but he was in and out buying cars, and I was around the lot.

Q. What did you do?

A. I did the banking and that sort of thing.

Q. Did you keep the books yourself?

A. No, I did not.

Q. Did you ever make any entries in the books?

Mr. Chichester: You made the observation, Mr. Fairfield, at the outset that Mrs. Mahan's bankruptcy was not involved here.

Mr. Fairfield: That is correct.

Mr. Chichester: The petition and the order to show cause are filed in the consolidated cases. The issues here are in both bankruptcies.

The Referee: In other words, the point is: By virtue of their being husband and wife, in a consolidated bankruptcy if the attachment is void, it

(Testimony of Grace Mahan.)

is void as against the interests of both the husband and the wife, and if one was insolvent, then the other is insolvent, since both had the same property. Is that the situation?

Mr. Chichester: That is right. I intend to bring out the situation as to liabilities and assets of Mrs. Mahan.

The Referee: In other words, while your action may have been against the husband only, it was an attachment upon property which they both owned either jointly, or as joint tenants, or it is community property—whatever the [70] situation may be, and I infer that is the reason that the order to show cause is in both names.

Mr. Chichester: The Trustee is the Trustee in both cases, and both parties have the same interest under the contract in the property, and this is to adjudicate the rights of the Trustee as to both bankrupt estates. I just wanted to clarify that.

Q. (By Mr. Fairfield): You, yourself, did not keep the books or records at all, did you?

A. No.

Q. Did you ever check over the accounts to see how much money was owed? A. Yes.

Q. You are familiar with all of the liabilities of the business enterprise. Is that correct?

A. Yes.

Q. (By the Referee): Were you actively engaged with your husband in the operation of his business? A. Yes.

Q. And you were almost in daily contact with

(Testimony of Grace Mahan.)

his business affairs. Is that correct? A. Yes.

The Referee: You may proceed, counsel.

Q. (By Mr. Fairfield): Calling your attention to Schedule A-2, which is that trust deed to Mr. L. Westermoe—he is an attorney, is he? [71]

A. Yes.

Q. Did you buy that property from him?

A. No.

Q. You just borrowed the money from him?

A. Yes.

Q. And you gave him a trust deed on that?

A. Yes.

Q. Do you know about when you borrowed the money from him?

A. It was borrowed at two different times. The last $9,500 was borrowed when Seaboard was putting the pressure on us for money.

Q. Do you recall just about when, the month or the date, or anything? Was that in the same year?

A. I think it was February.

Q. In February? A. February or March.

Q. Last year? A. Yes.

Mr. Chichester: What is that date?

Mr. Fairfield: February or March of 1954. Am I correct?

The Witness: Not '54.

Mr. Fairfield: I think it was '53.

The Referee: The petition in both of these matters was filed October 16, 1953. [72]

Mr. Fairfield: It is 1953.

(Testimony of Grace Mahan.)

The Referee: Were the petitions in both matters filed at the same time?

Mr. Chichester: Yes.

Q. (By Mr. Fairfield): You also have the property that was purchased from the Edison Security Company which you had listed at $25,000, that you had appraised at that particular time for that amount. Is that correct, Mrs. Mahan?

A. That is correct.

Q. Actually in the purchase of it you had purchased it for $34,000. Isn't that correct?

A. Yes.

Q. Did the property increase in value or decrease in value?

A. At times it increased, but at that time it decreased.

Q. I notice also in your schedule of real estate you did not put down the value of that piece of property. Would that still be the same value of $25,000?

A. Of course, I am not a real estate person. I realize that real estate goes up and down the same as anything else.

Q. I am talking now about the value of the property itself at 1002 South Atlantic Boulevard. You put down the fact that you were indebted to the Edison Company in the sum of $13,568.81. [73]

A. That is right.

Q. Then, in putting down the assets, real estate, you put down a figure for that piece of property of "unknown."

(Testimony of Grace Mahan.)

A. I feel that should also be $25,000.

The Referee: Let me see if I understand you correctly. On Schedule B-1 you show this lot at 1002 South Atlantic Boulevard, Los Angeles, and it shows in the right-hand column "estimated value of debtors' interest, $4,772.36." Are we talking about the same thing?

Mr. Fairfield: Yes, I had gotten it mixed up.

Q. Actually your value in that piece of property was more than $4,772.56. Isn't that correct?

A. I don't believe I understand you.

Q. Mrs. Mahan, let's go over it a little bit more closely, then.

You had a value there in the property of $25,000. Is that correct? A. That is correct.

Q. Out of that you owed the Edison Security Company some $13,568.81. Isn't that correct?

A. That is correct.

Q. Therefore, your equity in that would be more than $4,000. Isn't that correct? It would be nearer $11,000. Isn't that correct?

Mr. Chichester: There is a second trust deed of that [74] property of a balance of $6,658.83.

The Referee: On the same schedule it says, "First trust deed held by Edison Security Company, March 12, 1948, in the amount of $13,568.81," which is the amount of the first. If so, what is the amount of the second trust deed?

Mr. Fairfield: The amount of that is $6,658.83. I might add that it wasn't the witness that was

(Testimony of Grace Mahan.)

confused, it was I, for the simple reason that you have similar addresses there.

The Referee: We know you are not doing it intentionally.

Q. (By Mr. Fairfield): Let me get back to your claim against the Seaboard Finance Company. You were compelled to borrow money from the Seaboard Finance Company. Is that correct?

A. We borrowed money from them.

Q. I think you borrowed $10,000 from them?

A. Yes, that is right.

Q. As part of the agreement to borrow the money from them you had paid them a usurious rate of interest. Is that correct?

A. We paid them the interest they asked.

Q. Do you recall what that rate was offhand?

A. Supposedly six per cent.

Q. In addition to that they took, I think, some bonuses and charges, and so forth? [75]

A. Yes.

Q. And that is the basis of your lawsuit against them. Is that correct? A. That is correct.

Q. In September of 1953; September 16th, you filed a lawsuit against them to recover the excess interest that you had paid, and that amounted to, I think, some $81,000? A. Yes.

Q. That lawsuit was filed in behalf of you and your husband. Is that right? A. Yes.

Q. At that particular time, according to the books and records of your business and your husband's business you felt that the Seaboard Finance

(Testimony of Grace Mahan.)

Company was indebted to you for that amount. Is that correct? A. That is correct.

Q. As far as you are concerned you still do feel that way, do you? A. Oh, yes.

Mr. Fairfield: Nothing further.

Redirect Examination

By Mr. Chichester:

Q. Mrs. Mahan, with respect to the schedules filed by yourself in these bankruptcy proceedings, case number 58443-BH, you have filed duplicate schedules to those from which you have been testifying, which are your husband's [76] schedules. Is that right? A. That is right.

Q. And if you were testifying, and we were going over the same ground for your own position, your testimony would be the same. Is that correct?

A. That is correct.

Q. And you had no additional or separate property or assets other than those set forth in your schedules? A. No.

Mr. Chichester: That's all. We have nothing further.

The Referee: Step down, Mrs. Mahan.

Mr. Chichester: I will ask the Court to take judicial notice of its own records. There is an appraisal on file, made quite recently, of the property involved in these proceedings. That appraisal was made on August 1, 1955, by Mr. H. A. Sheedy. The amount of the appraisal is $25,000.

The Referee: Very well. The Court has the appraisal before it showing the value of the property to be $25,000, and will take judicial knowledge of such appraisal.

Mr. Chichester: I will also ask the Court to take judicial notice of the total amount of claims filed in these proceedings. This is not absolutely binding upon the respondents here, but it is some evidence, and it is up to the Court to give it whatever weight it sees fit.

The claims filed herein are in the total amount of [77] $133,998.18.

Mr. Fairfield: We would interpose an objection as far as the evidence is concerned, as far as the respondent herein is concerned, that the statement of claims on file in the amount of $133,998.18 goes outside of the scope of the solvency of the bankrupt as of September 16th, and I think the only testimony we have there is Mrs. Mahan's testimony that the liabilities are such as are set forth in the schedules themselves as of that date. We have no way of knowing what claims were filed. We have no way of knowing whether they were any good or what they covered.

The Referee: Proceed, gentlemen.

Mr. Fairfield: We have nothing further.

We have no evidence that we can produce at this particular time.

Is Mr. Chichester resting?

Mr. Chichester: Yes.

Mr. Fairfield: We feel that there hasn't been sufficient proof that the bankrupt was insolvent on

September 16th. As a matter of fact, we have evidence to the contrary; that the assets there were worth considerably more than the liabilities.

The Referee: You mean if you include the claim for usury against the Seaboard Finance Company. Is that correct?

Mr. Fairfield: That is correct.

The Referee: Other than that, an appraisal in this [78] case has been made that the bankrupt was insolvent on the date they levied the attachment.

Mr. Fairfield: That is correct.

The Referee: That is the only point that is disturbing the Court.

As to the claim for usury, how much weight that is entitled to—in other words, let me ask you this: You didn't develop what disposition has been made of that action which was filed through Mr. Munnell.

Mr. Chichester: I think I addressed one question to the witness. The answer was that it had not been disposed of, and that is my information.

The Referee: What is going to happen to it? Is it going to be tried? Is it a meritorious action?

I assume that a man of Mr. Munnell's caliber wouldn't bring an action unless he felt that it had some merit to it, because an attorney, no matter how capable he is, and I know Mr. Munnell is extremely capable from my experience with him as an adversary—but that still doesn't mean that you are going to recover a judgment in the amount that you sue for, or any fraction thereof, or even if you

are going to recover at all. It is a very uncertain value, but what value it may have—I am just wondering if you should not clear up that point.

Mr. Chichester: My point is this, my position is, your Honor, in a situation where a cause of action is filed [79] attempting to determine the solvency of an individual, and putting some kind of a value on a cause of action—that until a judgment has been rendered it has no value at all.

The Referee: Do you think that this Court can entirely disregard that action for recovery of usurious interest which has been filed against the Seaboard Finance Company?

Mr. Chichester: Oh, yes, I think so.

The Referee: You may be right.

Mr. Chichester: I don't think that an action filed by any person or corporation or group of persons can have any intrinsic value until a judgment has been rendered.

The Referee: Would you take that same position with reference to an account receivable or are you taking that position because this is an action for usury?

Certainly you would take into consideration the value of accounts receivable as well as accounts payable to determine the solvency of debtors in an involuntary proceeding.

Mr. Chichester: If we have an account receivable, expert testimony can be introduced as to the probability of collection, and then it only goes to the weight of that testimony.

The Referee: What do you propose to do with this pending action?.

Mr. Chichester: At the present time it is my [80] information that it is being handled by William Rosenthal, and it has been in his office.

Mr. Munnell: I don't think he is any longer handling it. I don't know if there has been a substitution in that case or not.

The Referee: Were you attorney of record originally, Mr. Munnell?

Mr. Munnell: Yes.

Mr. Grant was going to attempt to substitute Mr. Rosenthal's office in the case, since I am out of town considerably.

The Referee: You are the attorney of record for the bankrupt in this matter, are you not?

Mr. Munnell: That is true.

The Referee: You may proceed, Mr. Munnell.

Mr. Munnell: Whether Mr. Grant has been able to employ Mr. Rosenthal's office on that particular matter, I am not sure. I am doubtful of it, however. I don't believe it has been done.

Mr. Chichester: I talked to Mr. Rosenthal some three or four weeks ago, and asked him the status of the case.

He said that it had entirely slipped his mind, but he would check into the file.

He was just then moving his office, and he said he would call me back, but I haven't heard from him.

Mr. Munnell: I will say this: If Mr. [81] Rosenthal's office had not been retained, I had originally

recommended to Mr. Grant—because of the fact that I would be away from the city for approximately six months during the legislative session, and if he hasn't retained him, and if Mr. Grant has not retained other counsel, I would be willing to try that lawsuit.

It is the type of lawsuit that should either be compromised or tried.

The Referee: Mr. Chichester, the only question before this Court is whether or not this action pending against Seaboard should or should not be taken into consideration in determining value of the assets as against the liabilities of the bankrupt as of the date of the attachment.

Mr. Chichester: I think I can clarify this, and perhaps simplify it. Counsel has objected to the introduction or the request on my part that the Court take judicial notice of the claim on file.

The Referee: If it was a formal objection, then it is overruled, because the cases very clearly hold, while it is not controlling, it is persuasive, and the Court may take it into consideration.

Mr. Chichester: I have gone over the claims which were filed by Seaboard Finance Company, and it was not attached to the date of September 10, 1953, six days prior to the date of the levy of attachment.

Even granting the usurious claim, the outcome of [82] the trial wouldn't overcome any question of insolvency.

The Referee: The cases don't go that far, at least, that I have had occasion to examine while

on the bench. They state that the schedules filed by the bankrupt may be considered in determining solvency or insolvency. In other words, they are not controlling, and they are subject to dispute by the creditor, like anything else. But I don't know of any authorities that hold that the Court may take judicial knowledge of the claims filed in determining the solvency, unless that claim is not disputed by the bankrupt. In other words, you didn't ask, and, of course, with this action pending you probably purposely refrained from asking whether or not that claim was or was not a valid claim.

I assume that the reason that you haven't objected to it heretofore was because of the pendency of this action, so you can't have your cake and eat it, too; it is an anomaly.

Mr. Chichester, I am going to give you an opportunity to present points and authorities on that one point, if you wish. In other words, I can rule now, or if you feel that you can enlighten the Court, we will give you time to file points and authorities, because I realize under your petition to compromise, under paragraph eight, as I recall, you allege as a condition precedent to this compromise that you must secure release of this debt. Am [83] I correct?

Mr. Chichester: That is correct.

The Referee: So I would suggest the petition to compromise and the petition to declare the attachment lien null and void both be submitted, and you will have ten, ten and five. In other words, the determination of solvency will depend upon the

value of that claim, because even from a practical standpoint should there be a substantial recovery in that action it might well turn the tide.

That will be the order of the Court, gentlemen, and the matter will stand submitted. The Trustee is to have ten days to open; the respondent ten days to reply, and the Trustee five days to close.

Mr. Chichester: Your Honor, on the petition to compromise, I don't see anyone here in opposition to it.

The Referee: Is there anyone present who wishes to be heard in connection with the petition to compromise filed in this matter?

There doesn't seem to be anyone.

Very well, the order of submission will stand.

[Endorsed]: Filed April 24, 1956, Referee. [84]

[Title of District Court and Cause.]

ORDER AFFIRMING REFEREE'S ORDER

At Los Angeles, California, this 7th day of May, 1956:

It appearing that a petition for review of the referee's order, dated February 20, 1956, having been filed herein by Maurice Penn and said petition having regularly come on for hearing before the undersigned on April 30, 1956, at 10:00 a.m., and the Court being fully advised in the premises,

Now, Therefore, It Is Ordered that the order of the referee made herein on February 20, 1956, be and the same is hereby affirmed.

Dated: May 7, 1956.

/s/ BEN HARRISON,
United States District Judge.

/s/ FRANK M. CHICHESTER,
Attorney for Trustee.

Approved as to form this 2nd day of May, 1956.

/s/ JOSEPH W. FAIRFIELD,
Attorney for Petitioner on Review.

[Endorsed]: Filed May 7, 1956, U.S.D.C.

Docketed and entered May 10, 1956. [87]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Maurice Penn, the petitioner in the above-entitled proceedings hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the Hon. Ben Harrison, entered on or about the 10th day of May, 1956, affirming the Order of the Hon. Joseph J. Rifkind, Referee in Bankruptcy, made and entered on or about the 20th day of February, 1956, in favor of the Trustee and against the petitioner, and that

this appeal is taken from each and every part of said Order as well as from the whole thereof.

Notice Is Hereby Further Given, that upon the appeal from the Order as hereinabove set forth, Maurice Penn will bring up for review and determination by the United States Court of Appeals for the Ninth Circuit, that certain order of the Hon. Joseph J. Rifkind, Referee in Bankruptcy, dated on or about the 20th day of February, 1956.

Dated at Los Angeles, California, May 11th, 1956.

/s/ JOSEPH W. FAIRFIELD,
Attorney for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 18, 1956. [88]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 94, inclusive, contains the full, true and correct copies of Answer to Petition for Order to Show Cause re attachment Lien, Notice of Appeal, Notice to Prepare Clerk's Transcript, Withdrawal and Abandonment of Appeal by Grace Mahan, Bond of Trustee, Certificate of Review, Debtor's Petition in Bankruptcy, Discharge of Bankrupt, Findings of Fact, Conclusions of Law

and Order, Memorandum of Authorities re Insolvency, Memorandum Opinion as to Validity of Attachment Lien of Maurice Penn, Minutes of the Court, dated April 30, 1956; Notice of Filing Certificate of Review, Notice of Hearing of Review, Order Affirming Referee's Order, Orders of Adjudication and of General Reference, Order to Show Cause re Attachment Lien, Petition for Order to Show Cause re Attachment Lien, Petition for Review, Points and Authorities on Review, Points and Authorities on Behalf of Trustee, Referee's Supplemental Certificate on Review, Reporter's Transcript, dated December 28, 1956; Respondent's Memorandum re Points and Authorities constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 21st day of June, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

/s/ EDWARD F. DREW,
Chief Deputy.

[Endorsed]: No. 15176. United States Court of Appeals for the Ninth Circuit. Maurice Penn, Appellant, vs. William R. Grant, Trustee in Bankruptcy of L. R. Mahan, Also Known as Lemuel Ross Mahan, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 22, 1956.

Docketed June 27, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15176

In the Matter of:

L. R. MAHAN, a/k/a LEMUEL ROSS MAHAN,

Bankrupt.

APPELLANT'S STATEMENT OF POINTS

To: Paul P. O'Brien, Clerk of the United States Court of Appeals for the Ninth Circuit:

Please Take Notice that pursuant to Rule 19(6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit and Rule 75, Federal Rules of Civil Procedure, the appellant in the above-entitled matter sets forth his points on appeal on which he intends to rely, as follows:

Point I.

The Court erred in affirming the Order of the Referee holding that the bankrupt was insolvent when the attachment was levied on September 16, 1953, and that the lien of said attachment was void and of no force or effect against the Trustee of Bankruptcy under § 67 (a) of the Bankruptcy Act.

Point II.

The Court erred in affirming the Order of the Referee that the Trustee in Bankruptcy has sus-

tained the burden of proof that the bankrupt was insolvent on September 16, 1953, the date when appellant filed a lien of attachment against the assets of the bankrupt.

Dated at Los Angeles, California, July 2nd, 1956.

/s/ JOSEPH W. FAIRFIELD,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 5, 1956.

Office - Supreme Court, U.S.
FILED
AUG 1 1957
JOHN T. FEY, Clerk

No. 334

IN THE

SUPREME COURT

OF THE

United States

October Term, 1957

No. 1

MAURICE PENN,

Petitioner,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of L. R. MAHAN, also known as LEMUEL ROSS MAHAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH W. FAIRFIELD
ETHELYN F. BLACK
JEROME A. REINER
Counsel for Petitioner.

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IN THE

SUPREME COURT

OF THE

United States

October Term, 1957

No. 1

MAURICE PENN.

Petitioner,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of L. R. MAHAN, also known as LEMUEL ROSS MAHAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Maurice Penn, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on the 8th day of May, 1957.

Opinions Below

The Opinion of the Court of Appeals is reported verbatim herein (Appendix A; pages 59 to 60). It is officially reported in 244 F. 2d 309.

Jurisdiction

The judgment of the Court of Appeals was entered on May 8, 1957 (Appendix A, page 61). A petition for rehearing was denied on June 17th, 1957. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. sec. 1254 (1).

Questions Presented

The sole question presented to this Court for determination is the power of a Referee in Bankruptcy to disregard the evidence and determine an issue of fact without resorting to the evidence. Indirectly involved in this question, and one in which there is no Supreme Court decision, and few decisions from intermediate appellate courts, is the method of evaluating a chose in action as an asset in a bankrupt estate.

Statutes Involved

The only statute involved is Sec. 67 a of the Bankruptcy Act (11 U.S.C.A. 107), the pertinent portion of which is as follows:

> "*Liens and fraudulent transfers* (a) (1) every lien against the property of a person obtained by attachment, judgment, levy or other legal or equi-

table process or proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or . . ."

Statement of the Case

The facts involved are as follows:

The Petitioner herein, Maurice Penn, caused an attachment to be levied in Municipal Court Case No. 124,775 entitled Maurice Penn v. L. R. Mahan, on certain real property described as Lot 28, Tract 8790, as per map recorded in Book 117, pages 43-44 of Maps, Records of Los Angeles County, State of California (Finding of Fact No. II, Tr. of Rec. p. 23). An order adjudicating L. R. Mahan as a bankrupt was entered on or about the 16th day of October, 1953 (Finding of Fact No. I; Tr. of Rec. p. 23; pp. 7-8). On the 7th day of December, 1955, the trustee filed its petition alleging that at the time of the said levy of attachment the bankrupt was actually insolvent and that by virtue of the provisions of §67a [11 U.S.C.A. 107] of the Bankruptcy Act said levy of attachment and subsequent judgment lien were void and of no effect as against either the trustee in bankruptcy or the bankrupt estate (Tr. of Rec. pp. 17-18) which allegation was duly denied by the respondent in its Answer to the Petition (Tr. of Rec. p. 19). The issues thus being framed the sole question posed to the court was the insolvency of the bankrupt at the time of the levy of the attachment (Tr. of Rec. p. 29).

In determining the solvency of the bankrupt on the 16th day of September, 1953, consideration must be given to whether the chose in action in the sum of $81,719.61 was worth that amount.

The trustee then produced as a witness Grace Mahan, the wife of the bankrupt (Tr. of Rec. p. 29) who testified that a cause of action against the Seaboard Finance Company based on usury had been filed on September 16, 1953, claiming damages in the total amount of $81,719.61 (Tr. of Rec. p. 36; p. 42). The witness and her husband felt that the Seaboard Finance Company was indebted to them for that amount (Tr. of Rec. p. 42; p. 43). This was the only testimony produced by the trustee to support his allegation that the bankrupt was insolvent at the time of the levy of the attachment. The only other evidence in the record relating to the value of this chose in action was the schedules (Tr. of Rec. pp. 5-7) verified by the bankrupt as part of an accurate inventory of his property (Tr. of Rec. p. 4, Paragraph IV).

From all of this the Referee found that the alleged claim for usury in the sum of $81,719.61 was inchoate and uncertain in character and amount and had no appreciable value and concluded that the bankrupts were actually insolvent under the provisions of §67a of the Bankruptcy Act and voided the attachment and the subsequent judgment lien (Tr. of Rec. pp. 24, 25).

Petitioner's Position

It is the position of the petitioner, that upon evidence properly submitted, a Referee in Bankruptcy may evaluate a chose in action. In the case at bar the trustee in bankruptcy submitted evidence that the value of the chose in action was $81,719.61. If we concede that under the circumstances the Referee had the power to give this evidence no weight the result therefor is there was *no* evidence in the record as to the value of the chose in action. The Referee therefore had no evidence upon which he could determine its value. He could not call upon his experience as a means of determining the value of the chose in action.

Argument

Without any evidence whatsoever, the Referee in Bankruptcy is precluded from making any finding of fact.

The trustee contends that since this claim against Seaboard is a lawsuit, its value as an asset should be discounted (Tr. of Rec., p. 46). In thus arguing the trustee overlooks the fact that the burden of proof is upon him to establish that this claim has no value and not upon the petitioner to supply evidence as to the lawsuit's actual value. (*In re Graves,* 27 Fed. Supp. 717, 718; *Dockery v. Flanary,* (Sup. Ct. Va.) 73 S.E. 2d 375, 377; *Sample v. Jackson* (Sup. Ct. N.C.) 26 S.E. 2d 876, 879; *Moffit v. Dennitson,* (Sup. Ct. Iowa) 294 N.W. 731, 734).

The argument of the trustee that until a judgment has been rendered a cause of action has no value at all

and that the court can entirely disregard it (Tr. of Rec. p. 46) is, of course, not correct. A judgment is merely the judicial determination of a claim by a court upon a matter within its jurisdiction (*U.S. v. Hark,* 320 U.S. 531, 534; 64 S. Ct. 359, 361). It is a matter of common knowledge that not all judgments are reducible to cash. Equally well known is the axiom that a claim against a substantially solvent defendant has greater value than an uncollectable judgment.

In the case at bar the action had been pending prior to the levy of attachment (Tr. of Rec. p. 36). If at the date of the hearing, December 28, 1955, 2 years later (Tr. of Rec. p. 28) the litigation had not been tried and disposed of, the fault lies with the bankrupt and the trustee for not diligently prosecuting the same. No reason is given why those charged with pursuing the litigation did not do so with all haste and dispatch (Tr. of Rec. p. 47).

In determining the value of the chose in action we have only the testimony of Mrs. Mahan (Tr. of Rec. pp. 36, 42, 43) and the verified schedules that it was valued in the sum of $81,719.61 (Tr. of Rec. p. 7). (*In re Mandel,* 127 Fed. 863; affirmed 135 Fed. 1021). No testimony was introduced by the trustee as to any other valuation. The testimony of this witness is not so improbable that it cannot be accepted as evidence. In any event, it was uncontradicted and testimony not improbable and uncontradicted must be accepted as true by the court. (*Hynes v. White,* 47 Cal. App. 549, 552, [190 P. 836]; *Hutchison v. Holland,* 47 Cal. App.

710, 712, [190 P. 1072]; *Gomez v. Cecena,* 15 Cal. 2d 363, 366, [101 P. 2d 477]; *Mantonya v. Bratlie,* 33 Cal. 2d 120, 127, [199 P. 2d 677]; *Lee Sing Far v. U.S.,* 94 Fed. 834; Wigmore on Evidence, 2nd Edition, §2034. Under such circumstances the Court may not disregard such evidence. Furthermore there is *no* evidence upon which the referee could have made a contrary finding.

The cases cited by the Referee in its memorandum opinion (Tr. of Rec. p. 22) do not hold a contrary view, but actually support appellant's position that the *burden of proof* is upon the trustee to establish the value of a claim before the Referee can make a finding as to its worth.

In *First National Bank v. Wyoming Valley Ice Company* (Dist. Ct. Pa.) 136 Fed. 466, the respondent argued that certain bonds totaling $90,000.00 and set up as a liability were invalid; and that if you subtract this sum of $90,000.00 from the liabilities, the assets would exceed the liabilities and there would be no insolvency. The respondent insisted that these bonds were invalid because there was no compliance with certain state requirements. The court there held that the question of the irregularity was one that only the state authorities could take advantage of and as a result respondent failed to sustain the burden of proof that these bonds were invalid.

In *Houghton Wool Co. v. Morris,* (C.C.A. 1) 249 Fed. 434, the Referee found that the bankrupt was insolvent, the court saying on page 435:

"That there was sufficient evidence to support these findings is not disputed."

In Re Cooper, (Dist. Ct. Mass.) 12 Fed. 2d 485, involved a cause of action for breach of contract growing out of a transaction relating to reorganization of the bankrupt's business; that the agreement itself was for some indefinite undertaking to furnish financial assistance. In this case the bankrupt himself admitted that the claim was not seriously considered by him (pp. 485-486). The court there said on page 486:

"The test seems to be whether the claim is one that can be rendered available for the payment of debts within a reasonable time."

In the case at bar the only testimony is that Mrs. Mahan considered seriously this chose in action and felt that the Seaboard Finance Company was actually indebted to the bankrupt in the sum of $81,719.61 (Tr. of Rec. pp. 42-43). Moreover, it is because of the laches of the bankrupt and the trustee that this lawsuit was not tried long before the hearing of the petition. In the normal course of events the lawsuit would have been adjudicated and a determination had whether recovery on the claim would have rendered sufficient funds avaliable for the payment of debts. As a matter of equitable principles the trustee in bankruptcy should not be permitted to remain idle more than two years and then without producing any evidence whatsoever argue that a chose in action is valueless.

On Page 60 of Appendix A, this Court concluded that the finding of insolvency on the date of issue by the Referee was fully justified since the Referee stated that serious question existed as to whether the finance company is subject to the usury act, or is a personal loan company excluded therefrom, and also *whether the amount claimed is the correct amount,* (italics added). This Court also concluded that the weight to be given to this claim for usury (based on the testimony of Mrs. Mahan, wife of the bankrupt) was properly within the discretion of the Referee.

What this Court overlooked is that Mrs. Mahan was called as a witness by the trustee, and she was a witness for and on behalf of the trustee. Under those circumstances the trustee was bound by her testimony.

It is axiomatic that a party is bound by the testimony of his own witnesses (*Wright v. Gordon's Transport,* 162 Fed. 2d 590, 591). Put another way, it has been held that a litigant cannot challenge his own unimpeached witness (*Burdon v. Wood,* 142 Fed. 2d 303, 306; Certiorari denied, 323 U.S. 733, 65 Sup. Ct. 70; 89 L. Ed. 588). This rule applies even where the litigant is a *quasi* public official. For example, in *Bowles v. Marx Hide and Tallow Co.,* 153 Fed. 2d 146, 147, the Court held that an OPA Administrator vouches for the credibility of his own witness.

In Re Erickson, 13 Fed. Supp. 853, 855, the Court held that where

> "An objecting creditor presented the bankrupt as his witness, as his sole witness, and as a credible witness, and is bound by his testimony, and he cannot be impeached or assailed by the objecting creditor."

In *Wiget v. Becker,* 84 Fed. 2d 706, in reversing a judgment for the defendant, the Court held on page 710 as follows:

> "Ordinarily, a party is bound by the testimony of his own witnesses. *Yellow Cab v. Rodgers,* (C. C.A. 3) 61 Fed. (2d) 729. To be sure, the evidence might justify the argument that a witness was mistaken, and the trier of fact may so find, but there must be evidence of mistake. *Michigan Central R. Co. v. Zimmerman,* (C.C.A. 6) 24 Fed. (2d) 23. There is no contention that Mr. Kurtzeborn made any mistake in his testimony, or that the facts upon which counsel have apparently acted in making the statement and admission of record are not true."

Likewise in the case at bar, no question has been raised why the testimony of Mrs. Mahan as to the value of her claim should be disregarded. Since this is testimony offered by the trustee in behalf of its own case, there is no justification whatsoever, why this testimony should be disregarded.

If we assume, for the sake of argument, that the Referee was justified in giving no weight to the evidence of Mrs. Mahan, then it was still error to find the bankrupt insolvent on the date in issue (App. p. 60)

for in such event there is no testimony of any type as to the value of the chose in action. Bearing in mind that the trustee has the burden of proving the value of a chose in action for the purpose of sustaining his obligation that the bankrupt was insolvent, disregarding the testimony of Mrs. Mahan that the chose in action was valued at the sum of $81,719.61 *does not* establish that the value of the chose in action was that amount or any amount or entirely valueless, for mere disbelief of a witness does not establish an affirmative case (*Heise v. Earnshaw Publications,* 130 Fed. Supp. 38, 41).

In *Estate of Burlew,* 146 A.C.A. 695, the court said on pages 701, 702 as follows:

> "While her testimony could have been disbelieved, there was no other evidence to believe, and as is said in *Hutchinson v. Contractors' State etc. Board,* 143 Cal. App. 2d ....., ..., ... [300 P. 2d 216]: (Advance Report Citation: 143 A.C.A. 733, 737-738)
>
> 'But the rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. " 'Disbelief does not create affirmative evidence to the contrary of that which is discarded. " "The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (citing cases)." " . . .

> The fact that one testifies falsely may, and usually does, afford an inference that he or she is concealing the truth but it does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.'" (citing cases)."

See also *Hutchinson v. Contractors State etc. Board*, 143 Cal. App. 2d 628; 300 P. 2d 216.

In *Barnett v. Terminal Railroad Assn. of St. Louis*, 228 Fed. 2d 756, 761, the court held that:

> "Where a party's own testimony, if true, would defeat his right to a verdict, and such statements are not modified or explained, a verdict may be directed against him."

In re Erickson, 13 Fed. Supp. 853, 855, the Court held:

> "Even so, there is no testimony in the case except that of the bankrupt and it is upon his testimony that reliance must be placed for decision here. The objecting creditor conducted the examination upon the apparent assumption that he was entitled to cross-examine and, if possible, impeach his own witness. A considerable part of the examination was conducted along this line and was not objected to, although objections, if made, would probably have been sustained by the referee. Examining the record in the light of the foregoing authorities, the report of the referee upon the facts and his recommendations cannot be sustained."

In *Controller of California v. Lockwood,* 193 Fed. 2d 169, this court in commenting upon the duties of a referee in bankruptcy to make findings upon evidence and not suspicion said as follows on page 172:

> "We agree with the District Court that there is no factual basis for the referee's conclusion. Suspicion, no matter how aroused, is not evidence. What we find here does not establish the fact in dispute. It lacks the quality of proof. The inference which the referee drew does not rest upon supporting fact or facts. His deduction does not come within the orbit of another certain truth. There are too many loopholes for a false deduction."

The point that petitioner has raised and which petitioner insists is error, is that even if the referee chose to disregard the testimony of the witness Mrs. Mahan as to the value of the chose in action, then there is no evidence in the record whatsoever as to any value which may be attributed to the chose in action. The referee did state

> "That serious questions existed as to whether the finance company is subject to the usury act or is a personal loan company excluded therefrom, *and also whether the amount claimed is the correct amount.*" (Italics added) (Op. p. 2)

But although the Referee may have decided to disregard the testimony of Mrs. Mahan and that the claim for usury in the sum of $81,719.61 was inchoate and

uncertain in character and amount, it is also equally true that there is no evidence as to what the actual value of the chose in action is, and the Referee under the circumstances had no basis in fact or otherwise to come to the conclusion that it was entirely valueless.

Conclusion

The ruling below raises the important question of the power of a referee in bankruptcy to render a decision without *any* evidence to support its conclusion. Petitioner concedes that if there is any evidence in the record, no matter how weak, to support the finding of the referee, the decision is not subject to attack, for no Court will engage in polemics as to what weight to accord evidence. But the situation in the case at bar raises the question as to the power of the referee to make a determination on a record barren of any evidence to support the decision. The Petition for a Writ of Certiorari should, therefore, be granted.

Respectfully submitted,

JOSEPH W. FAIRFIELD
ETHELYN F. BLACK
JEROME A. REINER
Counsel for Petitioner.

APPENDIX A
TRANSCRIPT OF RECORD

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. .....

MAURICE PENN,)
Petitioner,)
vs.)
WILLIAM R. GRANT, Trustee in)
Bankruptcy of L. R. MAHAN, Also)
Known as LEMUEL ROSS MAHAN,)
Respondent.)

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAURICE PENN,)
Appellant,)
vs.)
WILLIAM R. GRANT, Trustee in) No. 15176
Bankruptcy of L. R. MAHAN, Also)
Known as LEMUEL ROSS MAHAN,)
Appellee.)

Appeal from the United States District Court for the Southern District of California,
Central Division.
(Proceedings had in the United States Court of Appeals for the Ninth Circuit)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, February 5, 1957

Before: STEPHENS and BARNES, Circuit Judges, and CLARK, District Judge

Order of Submission

ORDERED appeal herein submitted to the Court for consideration and decision on briefs on file.

57

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Wednesday, May 8, 1957
Before: STEPHENS and BARNES, Circuit Judges,
CLARK, District Judge

Order Directing Filing of Opinion and Filing of Recording of Judgment

ORDERED that the typewritten per curiam opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

58

[TITLE OF COURT AND CAUSE.]

May 8, 1957

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS and BARNES, Circuit Judges, and CHASE CLARK, District Judge

Per Curiam

This is a bankruptcy appeal. The sole question to be determined by this Court is whether the bankrupt was insolvent on or about September 16, 1953, the date a levy of attachment was issued out of the Municipal Court of the City of Los Angeles, State of California, as against certain real property belonging to the bankrupt. 11 U.S.C.A. §107 (a) (1).

Appellant denied that bankrupt was insolvent on the date of the attachment contending that the bankrupt had a chose in action valued at $81,719.61, as against the Seaboard Finance Company, based on an action filed September 15, 1953, against such finance company for usury.

The Referee found that the alleged claim for usury in the sum of $81,719.61 was inchoate and uncertain in character and amount and had no appreciable value

and concluded that the bankrupt was insolvent at the time the attachment in issue was levied.

Appellant argues that appellee failed to sustain the burden of proof of insolvency of the bankrupt on the date of the attachment. We disagree. Without the chose of action for usury the bankrupt was clearly insolvent on September 16, 1953. The suit as against the finance company sought treble damages and was still pending on December 28, 1955, when the hearing was held before the Referee. Mrs. Mahan, wife of the bankrupt, testified that she and her husband believed they had a good cause of action for usury against the finance company. The Referee stated that serious questions existed as to whether the finance company is subject to the Usury Act or is a personal loan company excluded therefrom, and also whether the amount claimed is the correct amount.

We have examined the briefs of the parties and the authorities cited therein, and hold that the finding of insolvency on the date in issue by the Referee was fully justified. The weight to be given to the claim for usury was properly within the discretion of the Referee. Based on the circumstances of this case, we find no abuse of that discretion.

Judgment affirmed.

(Endorsed:) Per Curiam Opinion. Filed May 8, 1957.

Paul P. O'Brien, Clerk.

60

[TITLE OF COURT AND CAUSE.]

Judgment

Appeal from the United States District Court for the Southern District of California,

Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered: May 8, 1957

PAUL P. O'BRIEN, Clerk.

61

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, June 17, 1957.
Before: STEPHENS and BARNES, Circuit Judges,
and CLARK, District Judge

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant, filed June 7, 1957, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

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[TITLE OF COURT AND CAUSE.]

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, to Record Certified Under Rule 21 of the Revised Rules of the Supreme Court of The United States

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-two (62) pages, numbered from and including 1, to and including 62, to be a full, true and correct copy of the entire record of the above-entitled cause in the said Court of Appeals, made pursuant to request of counsel for the Appellant, and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this third day of July, 1957.

.....

PAUL P. O'BRIEN, Clerk.